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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-304

MARSHALL I. TEICHNER,

Petitioner,

v.

ATTORNEY DISCIPLINARY SYSTEM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. A, pp. 1a-28a, *infra*) is reported at 75 Ill. 2d 88, 387 N.E.2d 265 (1979). The Report and Recommendation of the Review Board of the Attorney Disciplinary System (Pet. App. B., pp. 29a-30a, *infra*), and the Report of the Hearing Board of the Attorney Disciplinary System (Pet. App. C, pp. 31a-46a, *infra*) are not reported.

JURISDICTION

The opinion of the Illinois Supreme Court was filed on January 12, 1979. A timely Petition for Rehearing was

denied on March 30, 1979. Pet. App. D., p. 47a, *infra.* On June 19, 1979, Mr. Justice Stevens extended the time within which to file a petition for certiorari to and including August 24, 1979. Pet. App. E., pp. 48a-49a, *infra.*

QUESTIONS PRESENTED

1. Whether an attorney who is asked to represent a victim of a major railroad disaster which has injured many people is constitutionally protected in initiating subsequent discussions regarding possible representation with other victims of the disaster, thereby heading off efforts by the railroad's claims agents to obtain quick and cheap settlements with these victims.

2. Whether petitioner, whose hearing on disciplinary charges was held long before this Court's decisions in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *In re Primus,* 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), should be given an opportunity, at a new hearing, to establish facts which would bring his conduct within the constitutional protection established by the Court in those cases.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 2-103 of the Illinois Code of Professional Responsibility provided in relevant part:[1]

> (A) A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

[1] There have been non-material changes in this Rule since the proceedings below were initiated.

> (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, . . .
>
> (C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, . . .

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The First Amendment and the Fourteenth Amendment, United States Constitution, are also involved.

STATEMENT

INTRODUCTION

Petitioner was admitted to the Illinois Bar in November 1959 and has had an unblemished record while engaging in the practice of law in Chicago, Illinois, since his admission. This case concerns charges of improper solicitation filed against petitioner in 1975 on account of his activities in relation to major railroad disasters in Laurel, Mississippi, in 1969, and in Decatur, Illinois, in 1974. The charges began with a complaint made against petitioner by an attorney with a large Chicago law firm.

The firm represented the railroad involved in the Mississippi disaster, and the attorney was displeased that petitioner's conduct interfered with what he described as the efforts of the railroad's "large number of claim agents who worked around the clock with a board to make immediate settlements" of potential individual claims.

A two-day hearing on the solicitation charges was held in December 1975—more than eighteen months before this Court's constitutional ruling in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and more than thirty months before this Court's announcement of new constitutional guidelines concerning solicitation by attorneys in *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).[2] The *Primus* and *Ohralik* decisions were issued after the case had been briefed and argued orally to the Illinois Supreme Court. Without affording petitioner a fresh opportunity to present proof addressed to the new constitutional standards, the Illinois Supreme Court applied this Court's recently announced guidelines to the record previously made. The court concluded that petitioner's conduct in Mississippi had been protected by the First Amendment and that his conduct in Illinois had not. On the basis of these findings, the Illinois Supreme Court suspended petitioner from the practice of law for two years.

1. The Mississippi Rail Explosion

In the early morning hours of January 25, 1969, two large tank cars containing more than 60,000 gallons of

[2]We shall cite the transcript of this hearing as "Tr." We shall use the designation "Adm'r Exhibit No. __" to refer to the Exhibits introduced at the hearing by counsel for the Illinois Disciplinary System. These Exhibits included depositions and statements of certain witnesses.

liquid propane exploded in Laurel, Mississippi. Many individuals in the area were injured, and extensive property damage resulted from the fire and explosions. As reported in a decision of the Fifth Circuit, the railroad involved—the Alabama Great Southern Railroad Company—"began processing" damage claims "on the day following the derailment." *Alabama Great So. R.R. v. Allied Chemical Corp.*, 501 F.2d 94, 96 (5th Cir. 1974), approved on rehearing *en banc*, 509 F.2d 539 (1975). The railroad's agents descended on the neighboring community and began negotiating settlements with those who had been injured or had suffered property damage.

One of the leaders of Laurel's black community, which had been severely affected by the disaster, was Reverend Allen Johnson, pastor of the St. Paul United Methodist Church. Reverend Johnson testified that he believed that members of his community were settling their claims for inadequately low payments. He observed "too many [railroad representatives] going around trying to buy the people off . . . [by] offer[ing] small amounts of money to have them sign papers" (Tr. 187-188).[3] Associates of his, including leaders of the local chapter of the Southern Christian Leadership Conference, began to talk to him about "getting some legal advice for the people" (*ibid.*). He then called in lawyers from "all over the state" to advise those who had been injured. He testified about a conversation he also had with a cousin who resided in Chicago (Tr. 189-90):

> . . . I needed some expertise, people who could go up against the railroad lawyers—you know how they

[3]The Fifth Circuit's decision reports that "over $7,395,000" was paid out "to settle 3,492 claims and defray expenses." 501 F.2d at 96. This means that the average setttlement was approximately $2,000.

are because my experience has been with local lawyers even in my own case where they would take them monies from the people and not get a proper settlement. I told him I needed a Philadelphia lawyer, using that term, and he referred me to Marshall I. Teichner, who had been his lawyer on one or more cases. I called Marshall Teichner and asked him, would he have the guts to come to Mississippi and stand up—in my community.

On being invited by Reverend Johnson, petitioner came to Mississippi, attended a meeting at the church for victims of the railroad disaster, and, in the company of the Reverend's aides, visited several people in the community to discuss representing them or their relatives on a contingent-fee basis. Several of those with whom he spoke signed contracts authorizing petitioner to represent them. Others declined (Tr. 195-99, 275-81, 295, 297, 298-300).

As the court below noted, "counsel for the railroad lost little time in responding to this counterattack upon the railroad's settlement practices" (p. 4a, *infra*). The railroad was represented by a prestigious and powerful Chicago law firm, one of whose partners sent the following "Dear Joe" letter to the President of the Chicago Bar Association:[4]

Dear Joe:

We represent the Southern Railway System. We are informed that in mid-January, 1969, the Southern had a serious derailment at Laurel, Mississippi, that destroyed some 35 houses, injured about 40 people and caused one death. To provide prompt relief for those harmed, many of whom were poor,

[4]The number of claims against the railroad actually arising from the explosion appears to have greatly exceeded that suggested by this letter to the Bar Association. See Note 3, *supra*.

the Southern promptly sent a large number of claim agents who worked around the clock with a board to make immediate settlements. A few days after the accident, Marshall I. Teichner, an attorney of 100 N. LaSalle Street, Chicago, Illinois, appeared in Laurel and went driving around, passing out business cards and seeking clients.

This information is passed along to you for such investigation and possible disciplinary action as may seem appropriate. If further information is desired from the Southern, we will be glad to supply it.

With warmest regards.

The railroad succeeded in its efforts to generate a disciplinary proceeding against petitioner. On April 7, 1970, the Chicago Bar Association notified petitioner that an inquiry had begun concerning his activity in Laurel, Mississippi.[5] Petitioner appeared personally before the Chicago Bar Association (Tr. 330-31), and thereafter heard nothing further about the matter (Tr. 332).

2. The Illinois Rail Explosion

In the early morning hours of July 19, 1974, a substantial quantity of liquid propane gas exploded in the yard of the Norfolk & Western Railroad at Decatur, Illinois (Tr. 433). Among the railroad's employees present on the premises at the time and injured by the explosion was Robert P. Lichtenberger. Shortly after the explosion, Lichtenberger was called by a resident of Decatur who was an acquaintance of his. The acquaint-

[5]The notification (Adm'r Exhibit No. 7) referred to petitioner's "arrest" in Laurel. This related to the fact that, at Reverend Johnson's request, petitioner had asked a local hospital to move a severely burned black family to better facilities. He was then arrested for "disturbance" and forfeited $25 collateral.

ance—who was the father of a friend of petitioner's—asked whether Lichtenberger had been injured and whether he had retained counsel. When Lichtenberger replied that he was unrepresented and would be interested in speaking with a lawyer, the acquaintance suggested he call petitioner, who was then in Chicago. Lichtenberger called petitioner (Tr. 467) and told petitioner on the telephone that he had not yet retained counsel and would want to meet with petitioner. But by the time petitioner arrived in Decatur for their meeting on July 24, Lichtenberger had retained a St. Louis attorney recommended by his union (Tr. 436-37). Lichtenberger testified with regard to the conversation he then had with petitioner (Tr. 439):

> Q. To the best of your recollection, what did you say to Mr. Teichner and what did he say to you concerning your representation?
>
> A. I apologized to him for having went ahead and sought other representation which I didn't intend to do and he said nothing out of the line, out of ordinary to me about—you know—my seeking other representation.

Lichtenberger told petitioner that he knew other people who were injured and who needed a good lawyer, and offered to call them and see if they needed help and wanted to talk to petitioner (Tr. 538).

Lichtenberger called a distant relative of his, Mrs. Barbara Hardy, the mother of a hospitalized employee injured in the explosion (Darryl Hardy) who had expressed to his fiancee's mother (Dora Hulvey) a desire to sue the railroad. Darryl Hardy at the time was hospitalized in Springfield, Illinois (Adm'r Exhibit No. 18, p. 6; Adm'r Exhibit No. 13, p. 10). Mrs. Hardy in turn called petitioner and asked him to come and see her. Petitioner met with Mrs. Hardy, who was "impressed" by

him and "felt he had the experience" but asked that he first go to Springfield to talk to Darryl's fiancee "before we make any definite arrangements." (Adm'r Exhibit No. 18, pp. 8-9.)

As had been true in the case of the Mississippi accident, the railroad had promptly sent its claims agents to the scene and they had begun making payments to victims and their families in exchange for their signatures.[6] Leesa Hulvey, the fiancee of Darryl Hardy, was given $200 by a claims agent and asked to sign a paper (Adm'r Ex. No. 16, p. 4).

Lichtenberger also wanted to visit Darryl Hardy in Springfield. Since his automobile had been "totaled" in the explosion and he had no other means of transportation, and since petitioner had agreed at Mrs. Hardy's request to see Leesa Hulvey in Springfield, Lichtenberger and petitioner drove to Springfield together (Tr. 440). In the course of casual conversation during the ride on July 25, Lichtenberger and petitioner discussed the accident and those who had been hurt (Tr. 442). After they arrived in Springfield, Lichtenberger went to the hospital with petitioner, where they met Leesa Hulvey.

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[6]The agents appear also to have been "counterattacking" and surveilling petitioner's activities. When petitioner arrived in Decatur on the evening of July 23 and rented an automobile, he had a conversation with the young lady behind the Avis Rent-A-Car counter. According to the testimony of the Avis employee, she learned that petitioner was a lawyer and, in further conversation, that he had come to Decatur in connection with the explosion. She testified that petitioner asked her if she knew the names of any employees of the railroad, promising, if she could provide any names, to pay her and to pay them (Tr. 408, 413-14). Petitioner's arrival was closely watched, however. The Avis employee testified that *on the very same evening* she was interviewed with regard to her conversations with petitioner (Tr. 414-15). The interviewer wrote down the fact that petitioner had promised to pay her and any railroad employees (Tr. 416), and this allegation became Count I of the complaint against petitioner.

Lichtenberger first inquired of Miss Hulvey if she had secured any other lawyer. When she said she had not, he introduced her to petitioner (Tr. 442-44). Miss Hulvey told petitioner she would consult with her parents about possible representation, and she then called her mother and told her mother about the conversation with petitioner (Adm'r Ex. No. 13, p. 16). After speaking, at Miss Hulvey's request, with Miss Hulvey's mother on the telephone, petitioner had a meeting with Mr. and Mrs. Hulvey (Adm'r Ex. No. 13, p. 18-19; Adm'r Ex. No. 14, p. 14). The parents advised their daughter to retain petitioner, which she did.

After he had been retained by Leesa Hulvey and learned the details of the $200 payment made to her by the railroad's claims adjuster, petitioner told Miss Hulvey to return the $200. Since she no longer had the money, which she had used to pay bills (Adm'r Ex. No. 13, p. 24), petitioner gave Miss Hulvey $200 to return to the claims agent. Miss Hulvey and her mother promptly visited the railroad representative to return the money.[7] The mother testified (Adm'r Ex. No. 13, p. 24):

> [T]he fella that was there said it would be harder to put the money back into the funds, for her to keep it.

After petitioner returned to Decatur from Springfield, he was also retained by Darryl Hardy's first wife, Brenda Hardy. Brenda Hardy testified that she was first called and asked to meet petitioner either by Darryl Hardy's mother or by his brother (Adm'r Ex. No. 17, pp. 6-7).

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[7]The record shows that the railroad actually stationed a "representative" around-the-clock at the hospital where the injured were taken. Thus Miss Hulvey's mother testified (Adm'r Exhibit No. 13, p. 24):

> We went immediately upstairs where there is always a railroad representative there and we went into the room and tried to return the money to the railroad.

Petitioner explained at the hearing that he did not believe there was any conflict of interest in representing these various members of the Hardy family (Tr. 510):

> Q. Were all these people's interests the same?
>
> A. At that time, yes. They were all interested in recovering as much money as possible from a possible wrongful death action against Norfolk & Western Railroad.

The remaining relevant counts of the complaint related to a payment of $100 made by petitioner to Shirley Tucker, another client who retained petitioner after being introduced to him by Lichtenberger, and to a meeting petitioner had with a Mrs. Garner, whom he called from Chicago at the suggestion of her neighbor and who arranged to meet with petitioner at her home (pp. 17a-20a; 24a-25a, *infra*).

3. The Disciplinary Proceeding

The disciplinary proceeding against petitioner began with the filing of an initial complaint on March 25, 1975, relating to the Illinois explosion. Thereafter, an amended complaint was filed which, *inter alia*, revived the Mississippi incident that had lain dormant for some five years. Most of the testimony concerning the events in Illinois was taken by deposition. An evidentiary hearing was held, however, on December 9 and 10, 1975. Six witnesses testified with regard to the events in Mississippi, and only Lichtenberger and the Avis employee testified concerning petitioner's visit to Decatur, Illinois.[8] Petitioner took the stand and was cross-examined with respect to both sets of allegations. So far as the trip to

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[8]Of the 574 pages of hearing transcript, the first 400 pages concern primarily the Laurel, Mississippi charges. The evidence concerning the Decatur charges is set forth at pp. 401-574.

Decatur was concerned, petitioner testified that he went to Decatur to visit Mr. Lichtenberger, pursuant to Lichtenberger's invitation on the telephone (Tr. 494, 532). Petitioner had also initiated a telephone conversation from Chicago with Mrs. Garner (Tr. 514). Mrs. Garner arranged for petitioner to come to her house to talk with her, which he did on July 24, the day after he arrived in Decatur (Tr. 517, 552-54).

The complaint made allegations regarding money which petitioner gave to individuals in Decatur while he was there.[9] Petitioner testified that $500 given to Lichtenberger was designed to compensate him for assistance in servicing clients in Decatur and possible investigative work (Tr. 501, 513, 568), and that $200 was given to Leesa Hulvey after petitioner was retained by her so that she could return that amount to the railroad (Tr. 501). Petitioner also loaned $200 to Darryl Hardy's first wife after she became his client because she was in need of money and her former husband, who was on the brink of death, was unable to provide the support needed for their child (Tr. 502). Petitioner also advanced $100 to Hardy's mother, after Hardy died (and after she had retained petitioner) to pay for various funeral expenses (Tr. 501). Finally, another client, Shirley Tucker, was loaned $100 after she retained petitioner in order to cover the cost of long-distance telephone calls made to friends involved in the accident who might wish petitioner's services and for other current expenses (Tr. 502).

The hearing took place almost ten months before this Court granted a writ of certiorari in *Bates v. State Bar*

[9]On the subject of the propriety of an attorney offering financial assistance to a needy client, the Illinois Supreme Court observed that such conduct was not "necessarily improper" (p. 15a, *infra*):

> This Court long ago rejected any rule which would permit indigent plaintiffs to be forced into hasty, inadequate settlements by their indigency.

of Arizona, 429 U.S. 813 (October 4, 1976), and more than one-and-one-half years before this Court's decision in that landmark case, 433 U.S. 350 (June 27, 1977). In presenting the facts and arguing them to the Hearing Board, petitioner's counsel had to assume, on the law as it then stood, that a lawyer could constitutionally be prohibited from initiating any discussion of his availability to serve as legal counsel, and that he was ethically obliged to await an approach from the client or an indication from a family member or friend of the client that the prospective client desired to see him.[10] Working in this framework, petitioner's counsel at the hearing offered no evidence concerning the situation in Decatur immediately after the explosion with regard to the availability of legal assistance for the victims. Thus, no proof was presented in areas bearing upon the constitutional privilege—*i.e.*, the presence of claim agents who were trying to settle cases quickly at low cost, the discussions among victims of the disaster regarding their legal rights, or the availability of organized community efforts to secure proper legal representation for the victims.[11] The Hearing Board issued its decision on October 15,

[10]The Illinois Court apparently permitted this premise—which we believe to have been rejected by *Bates*—to make its way into its opinion. With respect to petitioner's visit to Mrs. Garner, the court below said that (p. 18a, *infra*):

> it would have been improper for [petitioner] to have arranged an appointment with the Garners without their having approached him first.

[11]Lichtenberger testified that the attorney he retained between petitioner's telephone conversation with him and his meeting with petitioner had been introduced to him by the union grievance representative for the Norfolk & Western Railroad (Tr. 438). Whether community meetings or other organized efforts were being initiated in the wake of the disaster is an important factual issue in determining whether petitioner's reliance on Lichtenberger's introductions was a constitutionally protected means of communicating with prospective clients.

1976, sustaining all but two counts of the complaint.[12] The Board recommended a punishment of five years' suspension from the practice of law (pp. 31a-46a, *infra*).

4. Subsequent Proceedings

The case was then taken to the Review Board of the Attorney Disciplinary System, which coincidentally issued its decision on the very same day that this Court decided the *Bates* case. The Review Board summarily adopted the Hearing Panel's findings, but recommended a suspension of three years rather than five (pp. 29a-30a, *infra*).

The case next went to the Illinois Supreme Court. It was argued before the court on March 20, 1978, but was not decided until January 12, 1979, six-and-one-half months after this Court's decisions in *Primus* and *Ohralik*. The Illinois Supreme Court recognized the uniqueness of the aftermath of a major disaster in considering the propriety of initial attorney-client contacts. In describing the situation in Mississippi, the court said (p. 13a, *infra*):

> Here a railroad disaster injured a large number of people in Laurel's black community. The railroad's agents almost immediately began to settle legal claims with members of that community, who, by the railroad's own admission, needed the money. Yet to obtain that money, they had to release any and all claims against the railroad. Unable to afford legal counsel, the injured and their families probably were less able to evaluate the fairness of the proposed settlements. Illinois courts are not unfamiliar with the abuse and the "mutual mistakes of fact" which can result from such hasty, uncounseled settlements.

[12] The matter of petitioner's "arrest," which was part of Count XIV, was held not to warrant disciplinary action or consideration of disciplinary action (p. 45a, *infra*).

The Illinois Supreme Court distinguished, however, between the situation in Mississippi and that in Illinois on the ground that in Mississippi Reverend Johnson "was acting as part of a *bona fide* relief effort created to further interests independent of [petitioner's] interest in remunerative employment" (p. 14a, *infra*). On this account, it held that conduct by petitioner which would otherwise have amounted to solicitation was constitutionally protected. The court concluded that in Illinois, on the other hand, petitioner's discussions with the Avis employee or with Mrs. Garner "furthered the associational rights of no person or group" (p. 18a, *infra*). Without affording petitioner an opportunity to supplement the record, the court held (*ibid.*):

> Nor, on balance, did his actions further the dissemination of truthful information about the availability of legal relief and legal services to members of the public who were in need of such information.

On the basis of this judgment, the Illinois Supreme Court upheld nine of the solicitation charges relating to the Illinois disaster and reversed the charges relating to the Mississippi disaster. It then reduced the period of suspension from three to two years.[13]

REASONS FOR GRANTING THE WRIT[14]

This is the first case involving the application of the principles established in this Court's *Primus* and *Ohralik* decisions to the circumstances of a major localized disaster involving a large number of victims and a single

[13] The Illinois Supreme Court has reduced the recommended sanction in 20 out of 28 disciplinary cases in which written opinions were issued since the inception of the Attorney Disciplinary System. Thus it appears likely that even if the conclusions relating to Mississippi had not been reversed, petitioner's punishment would have been reduced.

[14] For purposes of this discussion, we assume the "facts" as they were viewed by the Illinois Court.

prospective defendant. In this singular situation, there are obviously very great risks that the legal rights of individuals will be eradicated in the course of a defendant's massive investment of time and energy to minimize its liabilities. Invariably, as is shown by the record in the Mississippi incident and implied by the record pertaining to the Illinois incident, a sophisticated defendant accustomed to dealing with individual claims will saturate a disaster area with claims agents who are instructed to work round-the-clock to secure as many signed releases as possible for low settlement figures. These agents for potential defendants are not, of course, prohibited from communicating directly, face-to-face, with the victims of a disaster. The availability of immediate cash for disaster victims (who usually find themselves, following tragedies of this kind, in very difficult financial circumstances) is, more often than not, an irresistible inducement for them to settle their possible claims, even at grossly inadequate figures.

Petitioner's experience with disasters of this kind led him to initiate discussions with some potential clients. He did not, like the attorney in *Ohralik*, exert either heavy-handed or subtle pressures on potential clients or use underhanded devices such as secret recorders. When he was told that a prospective client did not wish to be represented by him or wanted other representation, he withdrew. In every incident criticized by the court below and the disciplinary panels which it reviewed, petitioner's culpability was that he did not wait until the potential client called him first. The proof that he first telephoned to Mrs. Garner, that he encouraged intermediaries such as the Avis employee, Mr. Lichtenberger, or Shirley Tucker to communicate with other victims of the disaster so that they might invite him to discuss his possible retention—even to the extent of giving money to these intermediaries—was the gravamen of the charge

which now threatens to deprive him of his only livelihood for two years. In all probability that charge was initiated by railroad representatives, who were apparently watching his every move in Decatur (and who were certainly surveilling him in Laurel) so as to be able to institute a proceeding of this kind.

The decision of the Supreme Court of Illinois sustaining this disciplinary action is contrary to the constitutional policy which distinguishes the protected activities involved in *Primus* from the conduct held to be outside the First Amendment in *Ohralik*. By granting a victory to the railroads on this question, the decision of the Illinois Supreme Court enables them and others similarly situated to perpetuate a practice which overreaches hapless victims of disaster. Attorneys who might prevent such overreaching are, by this decision, forced to stand by passively and watch as individuals are approached and pressured by the nonlawyer agents of prospective defendants.[15] This Court should grant certiorari and reverse the judgment below or, at the very least, afford petitioner a fair opportunity to develop a factual record which will demonstrate to the Illinois tribunals and to this Court that there was no meaningful constitutional difference between his conduct in Mississippi in 1969 and his conduct in Illinois in 1974.

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[15] Such attorneys are likely to be sole practitioners who are not among the most powerful and influential members of the local bar. As the dissenting Justices of the Illinois Supreme Court in *In re Madsen* observed (68 Ill. 2d 427, 485-86, 370 N.E.2d 199, 205 (1977)):

> Here respondent is a neighborhood practitioner. He is a noninfluential member of the bar. When he mails a bar association brochure only to clients from whom he admitted he obtained no legal business, he is hailed before the Disciplinary Commission on an apparently anonymous complaint. Unfortunately, this is but another of justice's injustices—a

[footnote continued]

1. The ruling of the Illinois Supreme Court conflicts with constitutional doctrine announced and applied by this Court.

When it decided *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 3 (1964), this Court noted, as one of two competing concerns, that railroad workers "often fell prey . . . to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers . . . ." This Court again quoted that language in its decision in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459 n.16 (1978), where it went on to say:

> In recognizing the importance of the State's interest in regulating solicitation of paying clients by lawyers, we are not unmindful of the problem of the related practice, described in *Railroad Trainmen*, of the solicitation of releases of liability by claims agents or adjusters of prospective defendants or their insurers. Such solicitations frequently occur prior to the employment of counsel by the injured person and during circumstances posing many of the dangers of overreaching we address in this case.

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characteristic of the administration of justice from time immemorial. It always seems there are two standards: one for the influential, another for the noninfluential; one for the powerful, another for the powerless; and one for the highly respected, another for the nondescript. The differentiation in standards runs the long litany descriptive of differences in society.

See also Mr. Justice Marshall's observation in his concurring opinion in *Ohralik v. Ohio State Bar Ass'n, supra*, 436 U.S. at 475:

> The impact of the nonsolicitation rules, moreover, is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society . . . so the Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single practitioner or small-partnership form of practice . . . .

> Where lay agents or adjusters are involved, these practices for the most part fall outside the scope of regulation by the organized Bar; but releases or settlements so obtained are viewed critically by the courts.

The most effective counter-force to the wholesale denial of rights by the concerted actions of claim adjusters is the constitutional protection recognized in *Primus* for "advocating lawful means of vindicating legal rights," including "advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance." 436 U.S. at 432, quoting from *NAACP v. Button*, 371 U.S. 415, 437 (1963). In the exigent circumstances immediately following a major disaster, when claims agents are under orders to strike quickly, traditional rules of "etiquette" (see *Bates v. State Bar of Arizona*, 433 U.S. 350, at 371) under which attorneys must be passive until a prospective client first manifests an interest to speak with them are necessarily destructive of the legal rights of unfortunate victims. These lay victims—who may have been induced to take money from the railroad—are frequently unaware of the possibility of overcoming the releases they sign through a later lawsuit.

The Illinois Supreme Court recognized these facts, and it relied upon them to vacate all charges of misconduct relating to the 1969 events in Mississippi. But the court below surprisingly and erroneously shifted its ground when it considered the 1974 events in Illinois. It limited the constitutional protection to cases where a lawyer is invited to a disaster site by an established organization or other community group. Only in these circumstances, according to the court below, is there an "associational right" safeguarded by the First Amendment or a constitutionally protected need to "further the dissemination

of truthful information about the availability of legal relief and legal services . . ." (p. 18a, *infra*).

This distinction between communication with, or referral by, an organization, and similar conduct by an individual was squarely rejected in *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977), where this Court said of its earlier decisions approving of attorney referral systems utilized by unions or other organizations (emphasis added):

> Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. *This concern applies with at least as much force to aggrieved individuals as it does to groups.*

Thus, it should be constitutionally irrelevant whether the person who originally invited petitioner to the scene of a disaster and then gave him the names of potential clients to contact was a local pastor, active in black community organizations, or whether it was a private citizen who had been a victim and who knew of co-workers that might need lawyers. In either event, the First Amendment entitled petitioner to make an appropriate initial request of prospective clients which would head off precipitous settlements with ubiquitous claims agents who operate under no ethical restraints whatever.

2. At the very least, justice requires that the decision below be vacated and petitioner be afforded an opportunity to present proof that his case is within the reach of the First Amendment.

The reasons we have previously stated warrant the granting of certiorari and the consideration of this case on its merits to establish the permissible limits of solicitation activities by attorneys who are called to the scene

of major disasters. The Court may feel, however, that the record in its present form is inadequate to consider that question properly. The reason for this inadequacy is obvious. The hearing record was closed in December 1975—long before any counsel would have had any reason to believe that presentation of such facts would be relevant.[16] Thus, for example, the court below concluded on the record before it that, on balance, petitioner's activities were not needed to "further the dissemination of truthful information" to the victims of the disaster. Evidence should have been taken on this issue, which was crucial to the constitutional judgment.

In these circumstances, fairness demands that the record be reopened so that the constitutionally relevant facts may be presented.

A similar situation faced this Court in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). A New Hampshire jury had awarded a public official damages in a libel action in a trial held before this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the interval between the trial and the state appellate determination, *New York Times v. Sullivan* was decided. The New Hampshire Supreme Court affirmed the award, finding the recent decision of this Court to be no bar to relief. Although this Court concluded that the respondent "may have held" a public position within the meaning of the *New York Times* decision, it noted that "[s]ince *New York Times* had not been decided when his case went to trial, his presentation was not shaped to the 'public

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[16] The relevant facts emerged fortuitously in the case of the Mississippi explosion because Reverend Johnson testified fully regarding the circumstances under which petitioner came to Laurel. The constitutional significance of these facts did not become apparent, however, until after this Court decided *Primus* and *Ohralik*.

official' issue." 383 U.S. at 87. The Court said (383 U.S. at 87-88):

> The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the *New York Times* rule. Moreover, even if the claim falls within *New York Times*, the record suggests respondent may be able to present a jury question of malice as there defined. Because the trial here was had before *New York Times*, we have concluded that we should not foreclose him from attempting retrial of his action. We remark only that, as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official."

Petitioner—an attorney with a previously unblemished record whose career and livelihood are threatened with destruction—should be given the same opportunity afforded libel litigants in damage actions in the aftermath of the *New York Times* decision. Bar disciplinary proceedings of this kind are "adversary proceedings of a quasi-criminal nature," and the full panoply of due process rights attach to such proceedings. *In re Ruffalo*, 390 U.S. 544, 550-51 (1968).

This Court has ample authority under 28 U.S.C. § 2106 to vacate the judgment below and remand this case for an additional factual hearing. In many other similar circumstances—either where a new decision of this Court has been issued after an evidentiary hearing, or some other defect in the record is brought to the Court's attention on certiorari or appeal—the Court has exercised that authority. *E.g., Daniel v. Goliday*, 398 U.S. 73 (1970) (vacating three-judge-court decision for development of new record by parties with specific attention to constitutional issues raised by subsequent decision in, *inter alia*, *Goldberg v. Kelly*, 397 U.S. 254 (1970)); *DeMarco v. United States*, 415 U.S. 449 (1974) (vacating and remanding federal criminal conviction for factual hearing on claim improperly decided on basis of

transcript of another proceeding); *Proctor v. Warden*, 435 U.S. 559 (1978) (vacating and remanding denial without an evidentiary hearing of writ of habeas corpus relating to state conviction). A similar exercise of this Court's discretion is appropriate in light of the First Amendment and Due Process policy considerations at stake in this case. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975) (class-action job-discrimination case vacated and remanded for new evidentiary hearing in light of Court's subsequent decision clarifying standard of proof for job-relatedness).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Illinois reversed. Alternatively, this Court should summarily vacate the judgment below and remand the case so that a new evidentiary hearing may be held to determine the facts which are crucial to the applicability of the constitutional protection sustained in *Bates*, *Primus*, and *Ohralik*.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS
UNITED STATES OF AMERICA

OPINION

State of Illinois
Supreme Court ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of January in the year of our Lord, one thousand nine hundred and seventy-nine, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice
Justice Robert C. Underwood Justice Daniel P. Ward
Justice Howard C. Ryan Justice William G. Clark
Justice Thomas J. Moran Justice Thomas E. Kluczynski
William J. Scott, Attorney General
Louie F. Dean, Marshal
Attest: Clell L. Woods, Clerk

Be It Remembered, that afterwards, to-wit, on the 12th day of January, 1979 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

In re: Marshall I. Teichner,

No. 49982 Disciplinary Commission

An Attorney.

EXHIBIT B

Docket No. 49982 – Agenda 11
March 1978

In re
MARSHALL I. TEICHNER
Attorney, Respondent.

MR. JUSTICE CLARK delivered the opinion of the court:

The Administrator of the Attorney Registration and Disciplinary Commission filed a 14-count amended complaint against the respondent, Marshall I. Teichner, a Chicago attorney. The case was assigned to the Hearing Board panel for Springfield, which dismissed counts IV, VIII and XIII, found against the respondent regarding part or all of each of the remaining counts, and recommended that the respondent be suspended from the practice of law for a period of five years and until further order of this court. The Review Board affirmed the Hearing Board's dismissal of counts IV, VIII and XIII, and adopted the Hearing Board's findings as to the remaining counts, but recommended that the sanction be suspension for three years and until further order of this court. The matter comes before us on respondent's exceptions to the report of the Review Board; we also have allowed oral argument and the filing of additional briefs.

The Administrator has not specifically excepted in this court to the dismissal of counts IV, VIII and XIII, and, accordingly, we need not consider them further. Those counts which survived the scrutiny of the hearing and review boards generally involve the respondent's allegedly improper solicitation of employment in the wake of two railroad disasters, a derailment and explosion in Laurel, Mississippi, on January 25, 1969 (see *Alabama Great*

Southern R.R. Co. v. Allied Chemical Corp. (5th Cir. 1974), 501 F.2d 94, 96), and an explosion in Decatur on July 19, 1974 (see *People ex rel. Phillips Petroleum Co. v. Gitchoff* (1976), 65 Ill. 2d 249, 252).

Because respondent's conduct in the Laurel, Mississippi, incident occurred prior to the creation of the Attorney Registration and Disciplinary Commission, the Chicago Bar Association conducted the original inquiry into this matter under our former Rule 751(a) (43 Ill. 2d R. 751(a)), but apparently made no formal recommendation to this court in connection therewith. The Administrator apparently became aware of the Laurel incident only after filing his original complaint in this cause. Subsequently, the Administrator filed an amended complaint, of which count XIV contains the allegations regarding the Mississippi incident. Respondent objected to the inclusion of count XIV on the grounds that the delay between the original occurrence and inquiry and these proceedings was fundamentally unfair and therefore denied him due process of law. Both the Hearing Board and the Review Board were unpersuaded by this argument and so are we.

There is no statute of limitations governing our disciplinary proceedings. To constitute a bar to the maintenance of such proceedings, the delay must demonstrably have prejudiced the respondent's ability to present a substantial defense to the allegations. The mere passage of time is not enough. (See *In re Bossov* (1975), 60 Ill. 2d 439, 447.) We find that the respondent has failed to demonstrate the necessary prejudice in this case. He had adequate opportunity to confront and cross-examine those witnesses who testified against him, and he was not demonstrably hampered in obtaining and presenting evidence necessary to his defense.

The Laurel incident involved the derailment and explosion of a train operated by a subsidiary of the Southern Railway System. On January 25, 1969, at approximately 4:20 a.m., two jumbo tank cars, each containing approximately 32,000 gallons of liquid propane, derailed and exploded in Laurel. (See *Alabama Great Southern R.R. Co. v. Allied Chemical Corp.* (5th Cir. 1974), 501 F.2d 94, 96, *aff'd on rehearing en banc* (1975), 509 F.2d 539.) Among the killed and injured were many members of Laurel's black community. The Rev. Allen Johnson, pastor of the St. Paul United Methodist Church of Laurel and a leader in that community, established a comprehensive program of relief for the injured persons and their families. At about the same time, agents of the Southern Railway System began appearing in Laurel and negotiating settlement agreements with the injured. Rev. Johnson believed these settlement agreements to be inadequate and sought to obtain legal counsel for the injured and their families. Through his cousin in Chicago, Rev. Johnson contacted the respondent and asked him to come to Laurel. Rev. Johnson also sought assistance from lawyers all over the State of Mississippi, because it was his experience that local counsel in Laurel would not be satisfactory for the task at hand. At a meeting in Rev. Johnson's church which respondent attended but did not address, several attorneys advised the persons in the audience of their legal rights in general terms. After the meeting, Rev. Johnson assigned some of his aides to accompany the respondent in visiting injured persons and their families.

Counsel for the railroad lost little time in responding to this counterattack upon the railroad's settlement practices. The railroad's Chicago attorney wrote the

following letter to the president of the Chicago Bar Association:

"Dear Joe:

"We represent the Southern Railway System. We are informed that in mid-January, 1969, the Southern had a serious derailment at Laurel, Mississippi, that destroyed some 35 houses, injured about 40 people and caused one death. To provide prompt relief for those harmed, many of whom were poor, the Southern promptly sent a large number of claim agents who worked around the clock with a board to make immediate settlements. A few days after the accident, Marshall I. Teichner, an attorney of 100 N. La Salle Street, Chicago, Illinois, appeared in Laurel and went driving around, passing out business cards and seeking clients.

"This information is passed along to you for such investigation and possible disciplinary action as may seem appropriate. If further information is desired from the Southern, we will be glad to supply it.

"With warmest regards."

Respondent claims that the railroad's involvement in the instigation of the charges relating to the Laurel, Mississippi, incident fatally taints those charges and requires their dismissal. We disagree. Although the record reveals substantial involvement on the part of investigators employed by the railroad in the initial investigation of respondent's conduct in Laurel, we do not believe the record to be fatally tainted thereby. We also see no reason, on this record, to impugn the good faith of our attorney registration and disciplinary system in its investigation of this matter once it obtained custody of the file from the Chicago Bar Association.

Although the Administrator charged respondent with several instances of misconduct in connection with the Mississippi incident, the hearing and review boards found

that the Administrator had proved his case only with regard to two of the incidents, one involving Sears Ward, and another involving Dorothy Bunch Brown. Since the Administrator has not specifically excepted to the hearing and review board's findings regarding the other incidents, we need not consider them further.

With regard to the allegations involving Ward, the hearing and review boards found as follows:

> "Respondent, without invitation or request by Sears Ward, called upon Sears Ward in Laurel, Mississippi, at his place of business, identified himself as a lawyer and requested Mr. Ward's permission to talk with Ward's parents concerning the injuries they had sustained as a result of the railroad disaster and offered to advance money to Mr. Ward's parents if they needed it. Respondent on a later occasion came to the store where Ward worked and inquired of Ward if he had thought further about the proposition respondent had made to him concerning his representation of his parents."
>
> * * *
>
> "The actions and conduct of respondent in Laurel, Mississippi, with respect to the foregoing constitute the improper solicitation of a client and tend to bring the legal profession into disrepute."

The findings of the Hearing Board regarding disputed questions of fact, when affirmed or adopted by the Review Board, are entitled to approximately "the same weight as the findings of any trier of fact in our judicial system." (*In re Smith* (1976), 63 Ill. 2d 250, 255. Accord, *e.g., In re Bossov* (1975), 60 Ill. 2d 439, 441 (weight accorded findings of Commissioners under prior rule).) However, the nature of this court's role in disciplinary proceedings (see, *e.g., In re Sherman* (1975), 60 Ill. 2d 590, 593), as well as the complexity and subtlety of the distinctions between permissible and impermissible

forms of solicitation (compare, *e.g., People ex rel. Chicago Bar Association v. Edelson* (1924), 313 Ill. 601, and *In re Moore* (1956), 8 Ill. 2d 373, with *In re Damisch* (1967), 38 Ill. 2d 195, and *In re Hallett* (1974), 58 Ill. 2d 239), compel us to look further into the record to understand more precisely the nature of the respondent's conduct.

The record indicates that the respondent, accompanied by Wallace Dillon, a teacher at a local junior high school and aide to Rev. Johnson, visited Ward at a store he operated in Laurel. Although Ward was not a member of Rev. Johnson's congregation, he knew both Rev. Johnson and Dillon, was aware of Rev. Johnson's relief efforts, and agreed to talk with the respondent.

Ward's parents had been injured in the derailment and the respondent asked Ward's permission to speak with them in the hospital where they were being treated, and to offer them his services. There is no evidence that respondent asked Ward to request that his parents retain the respondent, although there is some evidence that either the respondent or Dillon offered to advance money to Ward's parents for their medical needs. Respondent also inquired as to whether the Wards were receiving proper medical attention. Ward nonetheless declined to give respondent permission to visit Ward's parents in the hospital. Respondent returned to Ward's store on a subsequent occasion, ostensibly to use a public telephone, at which time respondent again asked permission to visit Ward's parents to discuss his representation of them and Ward again refused.

Respondent denies that the foregoing conduct constituted the "improper solicitation of a client" and, alternatively, argues that his conduct was constitutionally protected.

The record clearly and convincingly demonstrates that respondent solicited employment by the elder Wards. That respondent never displayed a contract nor specifically requested Ward to recommend respondent to Ward's parents does not preclude our finding that, in context, the only reasonable conclusion that can be drawn from respondent's words and conduct is that he was seeking employment by the Wards. "Circumstantial evidence is legal evidence and neither the commissioners nor this court are required to be naive or impractical in appraising an attorney's conduct." (*In re Krasner* (1965), 32 Ill. 2d 121, 127.) Respondent's in-person communication with the elder Wards' son, whom respondent reasonably could expect to play an important role in his injured, hospitalized parents' decision, is, in this context, indistinguishable from communication directly with Ward's parents themselves. The contents of that communication indicated respondent's desire to be employed by the Wards and potential benefits which they might derive from that relationship, such as a loan to pay for certain of their medical expenses. Thus we find that the Administrator has, *prima facie,* met his burden of proof.

However, we also agree with the respondent that his conduct was constitutionally protected. Several decisions of the United States Supreme Court have established that, to protect the right of individuals to associate for the advancement of beliefs, ideas (*NAACP v. Button* (1963), 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328) and individual economic interests (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar Association* (1964), 377 U.S. 1, 12 L.Ed.2d 89, 84 S.Ct. 1113), the fourteenth amendment to the United States Constitution limits the power of the States to prohibit certain types of communications between attorneys and their potential clients. In addition, to protect the free flow of information regarding the availability and cost of legal services to potential clients, the court has sharply curtailed the power of the States to regulate published advertising by attorneys. (*Bates v. State Bar* (1977), 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691.) Finally, only recently has the court attempted to come to grips with the problem expressly reserved in *Bates,* the permissible scope of State regulation of in-person solicitation by attorneys. See *In re Primus* (1978), ___ U.S. ___, 56 L.Ed.2d 417, 98 S.Ct. 1893; *Ohralik v. Ohio State Bar Association* (1978), ___ U.S. ___, 56 L.Ed.2d 444, 98 S.Ct. 1912.

In *Ohralik,* the respondent attorney, Albert Ohralik, was picking up his mail at the local post office, when he learned from the postmaster's brother that Carol McClintock, with whom he was casually acquainted, had been injured. He called her parents, who said she was in the hospital. When he suggested that he might visit her there, they assented but asked that he talk with them first. When Ohralik called upon the McClintocks they told him that she was driving the family car when struck by an uninsured motorist, injuring both her and her passenger. Ohralik assured the McClintocks that the Ohio guest statute protected them from liability to her passenger. He then suggested that Carol needed a lawyer, to which suggestion Carol's mother responded that the decision was Carol's.

Ohralik then visited Carol, who was still lying in traction in the hospital. He asked her to sign an agreement permitting him to represent her. She refused, explaining that she first wanted to discuss the matter with her parents. Ohralik did, however, photograph Carol in her then current condition, and also photographed the scene of the accident. He then visited Carol's parents again, this time carrying a concealed tape recorder. Carol eventually signed a contingent-fee contract with him.

Ohralik also visited Carol's passenger, again carrying a concealed tape recorder. The passenger, 18 and not yet a high school graduate, indicated that she did not know what was going on, but said "O.K." to Ohralik's oral request to represent the passenger in her claim under Carol's uninsured motorist clause, in return for one-third of the recovery.

When the passenger's mother attempted to disavow this agreement, respondent resisted, thereby holding up settlement with the insurance company. Carol also discharged the respondent but paid him a whole third of the $12,500 recovery. She paid another lawyer $900 to represent her in obtaining the eventual settlement of her claim.

The Supreme Court of Ohio suspended Ohralik indefinitely (48 Ohio St. 2d 217, 357 N.E.2d 1097), and the United States Supreme Court affirmed. In the companion case, however (*In re Primus*), the respondent attorney, Edna Primus, was affiliated with the South Carolina branch of the American Civil Liberties Union, but received no compensation for this aspect of her practice. She did, however, receive a retainer from the Carolina Council on Human Relations, through which she was asked by Gary Allen, a local businessman and community activist, to address a group of women on welfare who had undergone surgical sterilization. Primus advised them of their legal rights, including the possibility of bringing suit against persons responsible for their sterilization.

Subsequently, the ACLU told Primus that it would sponsor the bringing of such a suit (though there was no evidence that Primus herself would have received compensation in connection therewith). After Allen told Primus that Mrs. Mary Etta Williams, who had attended the meeting, wanted to file such a suit, Primus wrote

to her informing her of the ACLU's offer. The South Carolina Supreme Court issued a public reprimand to Primus (268 S.C. 259, 233 S.E.2d 301), but the United States Supreme Court reversed. Although the holdings of *Primus* and of *Ohralik* each can be stated quite narrowly and thereby readily distinguished (see ___ U.S. at ___, 56 L.Ed.2d at 461-63, 98 S.Ct. at 1925-27 (Marshall, J., concurring in part and concurring in the judgments)), the court has used these cases as vehicles for articulating its analysis of the application of the guarantees of the first and fourteenth amendments to communications between lawyers and their potential clients regarding employment.

The court began its analysis by observing that the most important purposes of the first amendment are the protection of the rights of individuals to associate and of the free flow of information necessary to facilitate the expression of beliefs and ideas. (See ___ U.S. ___, ___, 56 L.Ed.2d 417, 434-35, 98 S.Ct. 1893, 1904-05; ___ U.S. ___, ___, 56 L.Ed.2d 444, 453, 98 S.Ct. 1912, 1918.) The court then observed that protection of the free flow of "purely commercial" information would inevitably weaken the protection of ideologically tinged expression. (___ U.S. ___, ___, 56 L.Ed.2d 444, 453, 98 S.Ct. 1912, 1918.) Accordingly, the court reasoned that purely commercial expression could be more severely restricted than other forms of expression. (___ U.S. ___, ___, 56 L.Ed.2d 444, 453, 98 S.Ct. 1912, 1918.) The court concluded that an attorney, such as Ohralik, whose interest in a case was purely commercial, could be more severely restricted in his expression than an attorney, such as Primus, whose interest was purely ideological. The restriction on the former, the court held, could include a prohibition of in-person solicitation, as a prophylactic measure to prevent fraud, undue influence, intimidation, overreaching and other forms of vexatious

conduct. (___ U.S. ___, ___, 56 L.Ed.2d 444, 456-60, 98 S.Ct. 1912, 1922-24.) In the case of the latter, however, only very narrowly drawn proscriptions of particular, harmful conduct would be permissible. (___ U.S. ___, ___, 56 L.Ed.2d 417, 439, 98 S.Ct. 1893, 1908. But see ___ U.S. ___, ___, 56 L.Ed.2d 417, 439-40, 98 S.Ct. 1893, 1909 (Blackmun, J., concurring).) The court recognized that the line ("based in part on the motive of the speaker and the character of the expressive activity") between "associational activity for the advancement of beliefs and ideas" and activity for the "advancement of [one's] own commercial interests * * * will not always be easy to draw," but concluded "that is no reason for avoiding the undertaking." ___ U.S. ___, ___ n.32, 56 L.Ed.2d 417, 438 n.32, 98 S.Ct. 1893, 1908 n.32. But see ___ U.S. ___, ___, 56 L.Ed.2d 417, 442, 98 S.Ct. 1893, 1910-11 (Rehnquist, J., dissenting).

Thus, the court suggests that, where the conduct of an attorney falls between the two extremes of Primus, who had a strong ideological interest and no pecuniary interest, and Ohralik, who had a strong pecuniary interest and no ideological interest, this court must first attempt to determine whether the attorney's motive and function entitle his speech and conduct to the greater protection afforded associational activity for the advancement of beliefs and ideas.

In the instant case, we are faced with an attorney whose activities are tinged with the sort of associational values strongly protected by the first and fourteenth amendments, yet whose intent to benefit financially also is unmistakable. If we were to base our judgment solely upon what we believe to be the prevailing motive of the respondent, we would have to conclude that his motive was pecuniary, not ideological. (*Cf., e.g., People ex rel. Chicago Bar Association v. Edelson.*) Yet our analysis

cannot stop there, for as Mr. Justice Marshall aptly pointed out in his separate opinion, activity and expression which fall within the core of protected first amendment values do not automatically lose their protection because the actor or speaker stands to benefit financially from his actions. (___ U.S. at ___, 56 L.Ed.2d at 464, 98 S.Ct. at 1928. See also *UMW v. Illinois State Bar Association* (1967), 389 U.S. 217, 19 L.Ed.2d 426, 88 S.Ct. 353; *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710; *Thomas v. Collins* (1945), 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315.) It is the flow of information and the effective association of individuals which are protected. See, *e.g., First National Bank v. Bellotti* (1978), 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407.

Here, a railroad disaster injured a large number of people in Laurel's black community. The railroad's agents almost immediately began to settle legal claims with members of that community, who, by the railroad's own admission, needed the money. Yet to obtain that money, they had to release any and all claims against the railroad. Unable to afford legal counsel, the injured and their families probably were less able to evaluate the fairness of the proposed settlements. Illinois courts are not unfamiliar with the abuse and the "mutual mistakes of fact" which can result from such hasty, uncounseled settlements. See, *e.g., In re Estate of Lilly* (1976), 41 Ill. App. 3d 348, 353 ("possibly misleading tactics of the adjuster"; possibility of greater recovery if an attorney had pressed for it); *Florkiewicz v. Gonzalez* (1976), 38 Ill. App. 3d 115, 120 (undue haste). See generally *Clancy v. Pa centi* (1957), 15 Ill. App. 2d 171, 174-75 (greater potential for error).

Faced with this situation, Rev. Johnson sought to obtain legal counsel for the members of his community.

Unable to pay for such legal counsel, the only attorneys he could turn to were those willing to operate on a contingent-fee basis.

We find it crucial that, in turning to the respondent for help, Rev. Johnson was not attempting to create a facade or device designed to facilitate the respondent's solicitation of remunerative employment (*cf. In re Primus* (1978), ___ U.S. ___, ___ n.20, 56 L.Ed.2d 417, 432 n.20, 98 S.Ct. 1893, 1903 n.20 (no evidence of "sham")), but rather was acting as part of a *bona fide* relief effort created to further interests independent of the respondent's interest in remunerative employment. Thus, even though the respondent's motives were predominantly pecuniary, his conduct served to further the interests of Rev. Johnson's community, and a blanket prohibition of all contact between respondent and that community would not pass constitutional muster.

We recognize that, at least where associational values are not implicated, in-person solicitation "for pecuniary gain" may be prohibited, and that, even where such values are implicated, "carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU" also has not been foreclosed. (*In re Primus* (1978), ___ U.S. ___, ___, 56 L.Ed.2d 417, 439, 98 S.Ct. 1893, 1908-09.) Thus, prohibition of in-person solicitation of contingent-fee contracts by attorneys operating at the behest of nonprofit organizations might well be among the types of restrictions which the United States Supreme Court would approve. Nonetheless, we decline to prohibit all such solicitation.

For all its abuses and excesses (see *Pocius v. Halvorsen* (1963), 30 Ill. 2d 73, 83), the contingent-fee system remains almost the only route to the courthouse for

individuals of moderate means. (See *In re Estate of Harnetiaux* (1968), 91 Ill. App. 2d 222, 228.) To deny Rev. Johnson's community the use of such attorneys to consult with the injured and their families on an individual basis would be to shut that community off from the most important, if not the only, source of the legal counsel they needed but could not afford. There is no evidence that, with regard to Ward, respondent's conduct involved any of the substantive evils against which the prohibition of in-person solicitation traditionally is directed. Nor was respondent's offer of financial assistance necessarily improper. This court long ago rejected any rule which would permit indigent plaintiffs to be forced into a hasty, inadequate settlement by their indigency. (*People ex rel. Chicago Bar Association v. McCallum* (1930), 341 Ill. 578, 589; Accord *Bounougias v. Peters* (1964), 49 Ill. App. 2d 138, 154. But *cf.* generally *Annot.* 8 A.L.R.3d 1155 (1966).) Accordingly, we deem it inappropriate to impose discipline for respondent's conduct with respect to Sears Ward.

The second instance of alleged misconduct in Laurel, Mississippi, involved respondent's contact with Mrs. Dorothy Bunch Brown. The Hearing Board found:

> "Respondent came to the home of Dorothy Bunch Brown in Laurel, Mississippi, and asked her to sign a contract of employment. Mrs. Brown [subsequently] did sign a contract of employment, *** at which time Respondent gave her $100.00 in cash and offered to give Mrs. Brown $80.00 per week thereafter. She had previously received the sum of $100.00 from a man by the name of Cornelius. Payments by Respondent to Mrs. Brown totalled $500.00."

There is no significant evidence in the record connecting "Cornelius" with the respondent. We reject

respondent's argument, however, that the Hearing Board found otherwise, therefore indicating its confusion on this point. Rather, since Mrs. Brown claimed that Cornelius was somehow connected with respondent, and since Mrs. Brown also claimed that she received a total of $600, including the $100 from Cornelius, it is clear that, by finding that respondent's payments totaled only $500, the Hearing Board rejected certain aspects of Mrs. Brown's testimony on this point.

Mrs. Brown was, by her own admission, somewhat hampered in her memory of the events in Laurel in 1969, by the passage of time. However, there are certain aspects of respondent's transaction with Mrs. Brown which are undisputed. First, it is undisputed that respondent offered to represent Mrs. Brown for a contingent fee. Second, it is further undisputed that the respondent advanced $500 to Mrs. Brown, apparently as a loan against the proceeds of her claim. Finally, it is also clear to us from the record that, as in the case of Sears Ward, the respondent visited Mrs. Brown in the company of an aide to Rev. Johnson as part of Rev. Johnson's program of providing legal assistance to the injured members of the community. Here, too, we find the evidence clear and convincing that respondent's motive was pecuniary, not ideological, in offering to represent Mrs. Brown for a substantial contingent fee. Yet, as in the case of Sears Ward, to prohibit this type of communication would be to deny legal assistance to persons in Mrs. Brown's position. Given the very limited weight which can be given to Mrs. Brown's testimony, we do not find clear and convincing evidence of overreaching or other improper conduct by the respondent in these circumstances which would justify the imposition of the disciplinary sanction.

We therefore decline to impose any sanction with regard to respondent's conduct in Laurel, Mississippi.

We now turn our attention to the counts dealing with the Decatur, explosion. In count I of his amended complaint the Administrator charged that the respondent offered to pay Mrs. Connie Snoke, an employee of an automobile rental agency at the Decatur airport, to introduce him to injured persons and their acquaintances and relatives. The Hearing Board found "[r]espondent solicited the aid and assistance of Mrs. Connie Snoke *** for the purpose of contacting individuals injured as a result of the Decatur explosion and obtaining employment by them." Although the record indicates only that Mrs. Snoke testified that respondent "told me that if I would give him some names and addresses of people that worked on the railroad he would pay me and pay them," the surrounding circumstances indicate that the respondent's intent was not to obtain the names of witnesses but, rather, names of potential clients, and therefore warrants discipline.

Counts II and III relate to the respondent's action in soliciting employment from Ruth Garner and her husband. The Garners' home was damaged by the explosion, and members of the Garner family temporarily were scattered, living in various locations. A friend of Mrs. Garner, Mrs. Stubblefield, told respondent "about Mrs. Garner's problems, and thought she was very confused and up in the air about things, and thought she would need good legal advice ***." Mrs. Stubblefield evidently offered to call Mrs. Garner and inform her of the availability of respondent's services. It is undisputed, however, that respondent did not wait to hear from Mrs. Garner but, instead, called her and arranged to meet her and her husband. When he arrived, she was, understandably, very upset. Her home was damaged, her family was scattered, and her insurance adjuster was unsympathetic to her desire to obtain temporary housing elsewhere to keep her family together. Nonetheless, respondent saw

fit to seek employment, on a contingent-fee basis, with Mrs. Garner at this time. (Although there is no evidence that respondent asked her to sign a contract, it is clear that he was seeking to be retained on a contingent-fee basis.) Later that day, the respondent returned to the Garners' house, where Jerry Garner met the respondent outside, told him that he and his wife did not wish to retain an attorney at this time, whereupon respondent left.

We agree with the hearing and review boards that discipline may be imposed for the conduct demonstrated by the evidence adduced with regard to counts I, II and III. Respondent's actions with regard to Connie Snoke and the Garners furthered the associational rights of no person or group. Nor, on balance, did his actions further the dissemination of truthful information about the availability of legal relief and legal services to members of the public who were in need of such information. There is no credible evidence in this record to indicate that the Garners indicated a desire to meet with the respondent before the respondent contacted them. Rather, quite the opposite is true. Respondent knew only that the Garners might have need of legal assistance, and from this he sought to insure that the legal assistance they received was his. Even if the respondent did not know, as he did, that Mrs. Garner was in no condition to calmly consider whether to sign away one-third of her claim in return for representation by the respondent, it would have been improper for the respondent to have arranged an appointment with the Garners without their having approached him first. The mere fact that the respondent thought he had been able to manipulate one of Mrs. Garner's friends to introduce him to the Garners was insufficient to justify his having contacted them without an indication of interest on their part.

That respondent was seeking to represent the Garners in return for a very substantial contingent fee is an aggravating factor in this case, even though the respondent did not ask Mrs. Garner to sign a contract at their first meeting. Although the economic imperatives which support the contingent-fee system also impel us to refrain from prohibiting its use by a community leader (such as Rev. Johnson in Laurel, Mississippi) to provide legal advice to persons who otherwise would not receive it, such considerations apply with substantially lesser force to respondent's conduct with regard to the Garners. Rather, the possible bad effects which obtain from the contingent-fee system predominate here. For example, the high cost (one-third of any settlement and up to 40 or 50 percent of any judgment obtained after trial and appellate litigation) of the contingent fee proposed here might not be justified in the minds of potential clients by the additional benefits, *i.e.*, higher recovery, obtained through the services of an attorney. In addition, an attorney with an interest in his client's recovery may tend to be less sensitive to a client's desire to avoid the trauma of litigation. Indeed, Mrs. Garner's doctor advised her that, for health reasons, she should avoid such trauma for the time being.

In *Pocius v. Halvorsen* (1963), 30 Ill. 2d 73, 83, this court observed:

> "Contingent fee contracts do have the practical effect of giving an attorney a pecuniary interest in the successful prosecution of the litigation and, therefore, it is felt that unless absolutely fair they will adversely affect the usual attorney-client relationship. [Citation.] For this reason, and because such contracts sometimes lead to solicitation and otherwise bring disrepute to the law, they are closely scrutinized by the courts."

Attorney-client disputes that result from such contingent-fee contracts are legion, and therefore, for the foregoing reasons, we conclude that the substantial contingent fee proposed by respondent is an aggravating factor in this case.

Counts V through VII and IX and X involve the respondent's solicitation of the family of Darryl K. Hardy while he lay hovering between life and death as a result of burns sustained in the Decatur explosion, and of Leesa Hulvey, the late Hardy's fiancee. The hearing and review boards made the following findings with regard to these counts which, with one exception, we find to be amply supported by the record:

> "Respondent, with the assistance of Robert Lichtenberger, with whom Respondent had arranged for introductions and names and addresses of persons injured in the Decatur explosion, approached Leesa Hulvey and solicited from her employment to represent her for claims for injuries sustained by her boyfriend and fiance, Darryl Hardy."
>
> "Respondent, further, approached Mrs. and Mrs. Hulvey, the parents of Leesa Hulvey, and solicited their assistance in convincing [her] to sign contracts of employment with Respondent."
>
> "Respondent, without invitation, approached Barbara Hardy, the mother of Darryl Hardy, a seriously injured burn victim of the railyard explosion in Decatur, Illinois and requested employment *** to represent her in connection with the injuries to her son."
>
> "Respondent, without invitation, approached Brenda K. Hardy, the divorced wife of Darryl Hardy and requested her to employ Respondent in connection with any cause of action she or her minor child [Darryl, Jr.] might have as a result of the explosion in the railroad yards at Decatur, Illinois."

Respondent's approach to Barbara Hardy was not uninvited. On the contrary it would appear that, because Lichtenberger was related by marriage to the elder Mrs. Hardy, Mrs. Hardy asked to meet with respondent, whose services she evidently found satisfactory. (She continued to employ him at the time she gave a deposition in this cause.) With regard to the other findings, however, there is more than ample support in the record.

The evidence indicates that Robert Lichtenberger called Barbara Hardy several times after the accident to inquire about her son Darryl. Darryl evidently had said during one of his moments of consciousness, "I got a railroad to sue," which Barbara repeated to Lichtenberger. Lichtenberger in turn suggested that Barbara call the respondent. She did and asked him to come talk to her. When he did, she suggested that he speak to Leesa, Darryl's fiancee. After speaking with Leesa, respondent returned the next day to again discuss his retention by Barbara, who then agreed to be represented by respondent. Respondent thereupon loaned Barbara money and explained that she and her son's fiancee, Leesa, and her son's ex-wife, Brenda (mother of Darryl, Jr.), would "work together" in their lawsuit.

Barbara, however, still was wary of Brenda's feelings toward her. There is no evidence that respondent disclosed the existence of any possible conflict of interest in the joint representation he proposed.

The evidence further indicates that respondent, either himself or with the assistance of Robert Lichtenberger, introduced himself to Leesa at the hospital where Darryl was being treated. When respondent asked Leesa whether she had an attorney, she said she did not but wanted to discuss the matter with her parents first. Leesa gave respondent her parents' phone number and he contacted them. In respondent's conversation with the

Hulveys, they emphasized their desire to see Leesa marry Darryl, with whom she had been living. The Hulveys agreed to respondent's respresentation of their daughter and themselves signed contracts with the respondent.

Respondent agreed to look into the question of facilitating the marriage of Darryl and Leesa, but there is no clear and convincing evidence of a *quid pro quo* relationship between the respondent's attempts to facilitate the marriage of Darryl and Leesa and the Hulveys' agreement to encourage Leesa to retain the respondent.

When respondent met with Mr. and Mrs. Hulvey and Leesa, she accepted their advice to retain respondent. Subsequently, respondent loaned Leesa $200 to repay the identical amount which she had "borrowed" from the railroad claims agent stationed at the hospital where the burn victims were being treated.

Respondent also went to the home of Brenda Hardy, Darryl, Sr.'s ex-wife and mother of Darryl, Jr. Respondent asked to represent her personally and on behalf of her minor child in any action she might have for the death or injury to Darryl. She agreed, and afterwards he gave her either $200 or $300. There is no evidence that respondent discussed with Brenda the potential conflict of interest in the joint representation.

After Darryl died, Brenda spoke with respondent at the funeral home and said that she wanted to discuss her situation with the attorney who had handled her divorce. Respondent opposed this suggestion, according to Brenda. It is interesting to note that there was an arrearage in the support payments for Darryl, Jr., resulting from Darryl, Sr.'s injury, but not even this obvious potential conflict of interest slowed respondent from recommending that everyone even remotely connected with Darryl's claim retain respondent.

Count XI deals with the respondent's relationship with Robert Lichtenberger, a resident of Decatur who was injured in the explosion. The hearing and review boards found as follows:

> "* * * Respondent requested the assistance of John Bolero in obtaining introductions to individuals injured as a result of the Decatur, Illinois explosion."
>
> "As a result of this request, Respondent received a call from Robert Lichtenberger and made an appointment to meet Robert Lichtenberger in Decatur, Illinois."
>
> "After his arrival in Decatur, Illinois, Respondent solicited employment by Robert Lichtenberger, and requested Robert Lichtenberger to assist Respondent in securing the names of other individuals injured by the explosion and arranging appointments for Respondent to meet with such individuals."
>
> "Respondent paid Robert Lichtenberger the sum of $500.00 in cash for his assistance in this regard."

With one exception, we find the evidence, on balance, clear and convincing in support of the findings of the hearing and review boards on this count. The evidence indicates that respondent had been dating Mary Bolero (a native of Decatur then living in Chicago) for some time prior to the explosion in Decatur. The day after the explosion, Miss Bolero called her father from respondents apartment, as she had in the past. Miss Bolero evidently told her father, John Bolero, that respondent was a lawyer specializing in plaintiff's personal injury work and asked if he knew anyone who might be interested in respondent's services. Bolero indicated that he did and spoke with respondent to ask respondent's permission to

recommend him to Robert Lichtenberger, who was the son of a friend of Bolero. Respondent gave Bolero permission to make such a recommendation. We find the evidence insufficient, however, to support the finding of the hearing and review boards that respondent asked Bolero to solicit Lichtenberger on respondent's behalf.

Lichtenberger called respondent and they arranged to meet in Decatur. However, before respondent arrived in Decatur, Lichtenberger already had obtained counsel through a labor union referral service. Lichtenberger testified that he offered to make amends to respondent by introducing him to other potential clients. The respondent subsequently paid Lichtenberger several hundred dollars, which payment respondent claims was for "legwork" and not for solicitation. However, it is undisputed that Lichtenberger recommended respondent to Barbara Hardy and Shirley Tucker (although now Shirley Tucker Shields, we will refer to her as Shirley Tucker), and, while not undisputed, it also appears that Lichtenberger introduced respondent to Leesa Hulvey. The amount of money involved is grossly disproportionate to the amount of legwork Lichtenberger had performed or was likely to perform in the near future. Nor do we believe it was, as respondent suggests, intended to buy a car to assist Lichtenberger in performing those services. Rather, in light of the surrounding circumstances, we think the only reasonable conclusion that can be drawn from this transaction is that respondent was compensating Lichtenberger for past and future services in the solicitation of clients. *Cf.* generally *In re Damisch* (1967), 38 Ill. 2d 195, 207.

Finally, in count XII, the hearing and review boards found:

> "Through *** Lichtenberger, Respondent approached Shirley Tucker and sought employment by her to represent her in connection with her claims for injuries sustained as a result of the railyard explosion in Decatur, Illinois."
>
> "Respondent requested Shirley Tucker to call other individuals whom she knew and who had been injured in said explosion for the purpose of obtaining employment by said individuals."

We find the evidence, on balance, clear and convincing in support of these findings. Shirley Tucker testified on two separate occasions that Lichtenberger recommended respondent to her, that she and respondent met subsequently, and that she retained respondent. After retaining respondent, Miss Tucker asked if she could call friends of hers who lived in Indiana and Missouri to recommend respondent to them. (On one occasion, she testified that he asked her to make the calls. She subsequently retracted that statement, however.) He agreed and gave her $100, of which he claims part was to cover the cost of the phone calls and part was intended as a loan. We conclude, however, that, like the money paid to Lichtenberger, a substantial portion of this money was intended to reward and induce Shirley Tucker's assistance in the solicitation of clients for respondent.

Although the offense of solicitation does not, in itself, import "venality, fraudulent practices or moral turpitude" (*In re Krasner* (1965), 32 Ill. 2d 121, 129), respondent's ancillary misconduct, particularly with regard to Ruth Garner and the Hulvey and Hardy families, demonstrates a gross deviation from the minimum standards of conduct expected of persons licensed to practice law in this state. Respondent's insensitivity to Mrs. Garner's inability to adequately evaluate her need for legal counsel (*cf., e.g.*, Illinois Code of Professional Responsibility, Disciplinary Rule 2–104 (1977)) and his com-

plete disregard of the conflicts inherent in the Hardy-Hulvey family situation (*cf., e.g.,* Professional Ethics Opinion No. 363, 60 Ill. B.J. 151 (1971); H. Drinker, Legal Ethics 105 (1953); Illinois Code of Professional Responsibility, Disciplinary Rule 5—105 (1970)) are examples of conduct which disserves the goal of making information about legal services available, because it dissuades individuals from seeking legal counsel.

Finding no merit in respondent's other arguments, we order that the respondent be suspended from the practice of law for 2 years.

Respondent suspended.

MR. JUSTICE KLUCZYNSKI took no part in the consideration or decision of this case.

MR. JUSTICE RYAN, specially concurring:

Although I concur in the conclusion of my colleagues as to the sanction imposed upon the respondent, I cannot agree that his conduct in Mississippi is not the proper subject of disciplinary action.

The majority opinion finds that the respondent's solicitation activities in Mississippi were tinged with associational values protected by the first and fourteenth amendments. I do not agree. The United States Supreme Court recently decided *In re Primus* (1978), ___ U.S. ___, 56 L. Ed. 2d 417, 98 S. Ct. 1893, and *Ohralik v. Ohio State Bar Association* (1978), ___ U.S. ___, 56 L. Ed. 2d 444, 98 S. Ct. 1912. Both of these opinions were filed on the same day. *Primus* involved activities and solicitation on behalf of an assocation in furtherance of the ends of the association and did not involve any commercial solicitation of business for the financial benefit of the attorney. *Ohralik,* on the other hand, involved no associational activities but did involve personal

solicitation by the attorney for contingent-fee contracts. The only difference between our respondent's activities in Mississippi and those of the attorney in *Ohralik* is the nebulous associational relationship which the majority finds present in our case. This relationship is apparently not with Rev. Johnson's church, nor was the solicitation to further its ends, because some of those solicited were not members of the church. The association which the majority finds renders this otherwise improper solicitation permissible is indefinitely defined as "Rev. Johnson's community." There is no organization in existence with which the respondent was associated. Rev. Johnson stood as a self-appointed person in the community conducting what he thought was a helpful effort. The opinion in this case fulfills the prophetic statement of Mr. Justice Rehnquist in his dissent in *Primus:*

> "And we may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of 'political association' to assure that insurance companies do not take unfair advantage of policy holders." ___ U.S. ___, ___, 56 L. Ed. 2d 417, 441, 98 S. Ct. 1893, 1910.

There is nothing in either *Primus* or *Ohralik* that requires that this court refrain from imposing sanction on the respondent for his solicitation in Mississippi. The majority opinion has gone far beyond the holding in *Primus.* The United States Supreme Court, by its holdings in the two cases cited, has defined an area of permissible solicitation and an area of impermissible solicitation. Admittedly there is a substantial undefined area between these two poles that must be charted. However this is the United States Constitution that is being interpreted. If further deviation is to be had from what has been heretofore viewed as acceptable limitations on commercial speech (solicitation of clients), the United States

Supreme Court, and not this court, should define the further expanded boundaries. Otherwise the area of commercial solicitation by an attorney which we may find to be protected by the first and fourteenth amendments may subsequently be found by the United States Supreme Court to constitute conduct not falling within these constitutional protections. The majority opinion relies to a great extent upon language used by Mr. Justice Marshall and by Mr. Justice Blackmun in their concurring opinions. The language of these two justices was not concurred in by other members of the court and should not be read as an indication that the United States Supreme Court did extend the constitutional protection of commercial speech to the solicitation carried on by our respondent. Just as this concurring opinion represents only the beliefs of its author, and not the holding of the court, so also must we view the language of Mr. Justices Blackmun and Marshall.

APPENDIX B

BEFORE THE REVIEW BOARD
OF THE ATTORNEY DISCIPLINARY SYSTEM
UNDER ILLINOIS SUPREME COURT RULES 751-770

[Filed June 24, 1977]

IN THE MATTER OF MARSHALL I. TEICHNER, *Respondent*	No. 74-DH-18

REPORT AND RECOMMENDATION OF THE REVIEW BOARD

This cause comes before the Review Board on the Hearing Panel's recommendation that the Respondent be suspended from the practice of law for a period of five years. The Review Board in this opinion adopts the findings of the Hearing Panel but recommends a period of suspension of three years, rather than five years.

Exceptions filed on behalf of the Respondent charge that the findings of the Hearing Panel are unsupported by the evidence and that the penalty imposed is unwarranted or excessive. In what was defined as "General Objections" the Respondent further contended that the report of the Hearing Panel was so vague, general, indefinite and confusing that it deprived the Respondent of a fair hearing and due process. During the course of Oral Argument before the Review Board, the Respondent, through his counsel, withdrew this contention. Counsel's withdrawal of the argument notwithstanding, this Board has reviewed the record below and find that it evidences a full, fair and complete hearing, a hearing which in the Board's opinion was clearly consistent with the fundamental principles of due process.

The Review Board further finds that there is an abundance of evidence in the record to support the findings of the Hearing Panel.

FINDINGS AND RECOMMENDATIONS OF THE REVIEW BOARD

The Review Board adopts the findings and recommendations of the Hearing Panel that Counts IV, VIII, and XIII of the Complaint be dismissed.

The Review Board adopts the findings of the Hearing Panel with respect to the remaining Counts of the Complaint.

It is the opinion and recommendation of the Review Board that the Respondent be suspended from the practice of law for a period of three years and until Order of Court.

Respectfully submitted,

Donald Morgan
Robert P. Cummins
George W. Howard, Jr.
Hugh J. McCarthy
Thomas D. Nyhan
John T. Perry

Mr. Silverman and Mr. Susler did not participate.

APPENDIX C

BEFORE THE HEARING BOARD
OF THE ATTORNEY DISCIPLINARY SYSTEM
UNDER ILLINOIS SUPREME COURT RULES 751-770

[Filed Oct. 15, 1976]

IN THE MATTER OF MARSHALL I. TEICHNER, *Attorney-Respondent.*	No. 74-DH-18

REPORT OF THE HEARING BOARD

The hearing in this cause was held on December 9 and 10, 1975 in the offices of the Attorney Registration and Disciplinary Commission, No. 10 Capitol Plaza, Springfield, Illinois. Members of the Hearing Board panel present were Guilbert H. Brown, Chairman, John M. Ferguson, Commissioner, and Roy I. Peregrine, Commissioner. Phillip E. Schickedanz, Esq., counsel for the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, appeared on behalf of the complainant, and Sidney Z. Karasik, Esq., 134 South LaSalle Street, Chicago, Illinois, and Robert B. Oxtoby, Esq. of Springfield, Illinois, appeared on behalf of the Respondent. The proceedings were reported by a certified court reporter and the Transcript of Proceedings is hereby certified as true and correct.

PLEADINGS

The case was tried on an Amended Complaint in which it is alleged and not denied by the Answer that Respondent, Marshall I. Teichner, was licensed to practice law in Illinois on November 19, 1959.

Carl H. Rolewick, the Administrator of the Illinois Attorney Registration Disciplinary System with the Supreme Court of Illinois filed a Complaint on March 21, 1975, against the Respondent, Marshall I. Teichner. The Complaint contained ten counts. Subsequently, on June 2, the Respondent filed an Answer to the Complaint and certain affirmative defenses.

On June 13, the Administrator filed a motion to amend the Complaint, which was granted and an Amended Complaint was filed against the Respondent containing fourteen counts. At that time the Respondent was given until July 1, 1975, to answer the Amended Complaint and the hearing date of June 25, 1975, previously set was cancelled and the matter was continued and reset for hearing on September 18, 1975.

On August 20, 1975, the Administrator filed a request to admit facts and the genuiness of documents.

On August 26, 1975, the Respondent filed a motion pursuant to Sections 45 and 48 of the Civil Practice Act moving to dismiss Count XIII of the Amended Complaint and *Count XIV* of the Amended Complaint.

On August 26, 1975 the Respondent filed an answer to the Amended Complaint.

On August 29, 1975, the Administrator filed a motion to continue the hearing. On September 2, 1975, the Respondent concurred in the request that the September 18 hearing be cancelled and that the matter be continued. The motion of the Petitioner and Respondent were both granted, and the case was continued to December 9, 1975, at Springfield, Illinois.

On September 5, 1975, Petitioner filed a response to Respondent's motion to dismiss *Count XIII* and *Count XIV* of said Complaint.

On December 5, 1975, the Respondent filed a motion for continuance of the hearing and this motion was denied by the panel.

Subsequently the panel denied Respondent's motion to extend the hearing date made on December 9, 1975.

Respondent's motion to dismiss Counts XIII and XIV of the Amended Complaint was taken with the case by the panel which reserved ruling thereon. With respect to Count XIV that motion is hereby now denied.

THE EVIDENCE

The evidence consisted of the testimony of nine (9) witnesses at the hearing, three (3) separate stipulations entered into between the parties and sixteen (16) exhibits offered by complainant and thirteen (13) exhibits offered by Respondent.

As part of the complainant's case, Respondent was called as a witness under Section 60 of the Civil Practice Act. Objection was made to this procedure which was overruled. Thereafter, Respondent refused to testify on the basis of the Fifth Amendment to the Constitution of the United States and on the grounds that his testimony might tend to incriminate him.

However, as part of Respondent's case, Respondent did testify as his own witness.

We shall hereafter deal with each Count of the Amended Complaint in chronological order, although, by stipulation of the parties and consent of the panel, evidence on the various Counts was heard out of chronological order.

COUNT I

In Count I it is alleged that Respondent arrived at the Decatur Airport on July 23, 1974, following the ex-

plosion in the railyards at Decatur on July 19, 1974. Further, that Respondent had not been employed by anyone in connection with the explosion.

These allegations are admitted by the pleadings.

It is further alleged that upon his arrival at the Decatur Airport, defendant rented an automobile from Avis Rent-a-Car Company and during the course of completing the rental agreement forms, Respondent offered to pay Mrs. Connie Snoke, an employee of the rent-a-car agency, to introduce him to anyone she knew who was injured in the aforementioned explosion; or to introduce him to her friends who might know the people injured in the explosion, and that such conduct by the Respondent tends to bring the legal profession into disrepute.

Respondent argues that although he did not represent anyone in Decatur at the time of his arrival, he arrived at Decatur pursuant to a telephone appointment made by Robert Lichtenberger, and further that Respondent did not solicit the names of persons injured from Mrs. Connie Snoke, but merely the names and addresses of persons who worked for the railroad.

From the evidence, the panel makes the following findings:

1. Respondent solicited the aid and assistance of Mrs. Connie Snoke, the Avis Rent-a-Car Company employee, immediately upon his arrival at the Decatur Airport, for the purposes of contacting individuals injured as a result of the Decatur explosion and obtaining employment by them.

2. The acts and conduct of Respondent in this regard constitute improper solicitation of employment and tends to bring the legal profession into disrepute.

COUNT II & III

In these Counts it is alleged that Respondent made an unsolicited telephone call to the home of one Ruth Garner, an explosion victim, on July 23, 1974, and on July 24, 1974 made two personal visits to Mrs. Garner and to her husband for the purpose of securing a contract of employment to represent them in connection with their claims arising out of the railyard explosion at Decatur, Illinois.

From the evidence, the panel makes the following findings with respect to Counts II and III:

1. The acts and conduct of Respondent in calling upon Ruth Garner and her husband and soliciting employment contracts from them, constitutes improper solicitation of clients as alleged in the Amended Complaint.

2. Such actions and conduct of Respondent tend to bring the legal profession into disrepute.

COUNT IV

No evidence was offered in connection with this Count and the same is, therefore, dismissed.

COUNTS V, VI & VII

In these Counts it is alleged on July 25, 1974, Respondent and William Royal went to the Memorial Hospital in Springfield, Illinois where all of the seriously injured victims of the Decatur explosion had been transferred for treatment; that while at Memorial Hospital Respondent introduced himself or sought his introduction to one Leesa Hulvey who was a girlfriend of Darryl Hardy, seriously injured by the explosion; that Leesa Hulvey had neither previously called the Respon-

dent nor had she requested anyone to contact the Responent on her behalf; that Respondent informed Leesa Hulvey he was an attorney and requested that Leesa Hulvey employ him to represent her in any cause of action she might have as a result of the explosion; that Respondent further suggested to Leesa Hulvey that she immediately marry Darryl Hardy so as to strengthen her position in litigation; that Respondent requested Leesa Hulvey to sign contracts of employment with him, which Leesa Hulvey refused.

In Count VI it is alleged that Respondent telephoned Dora Emily Hulvey, the mother of Leesa Hulvey and invited her and her husband to come to his motel room for the purpose of discussing his proposed representation of their daughter. In his conversations with Dora Emily Hulvey and Joseph Hulvey, Respondent requested them to convince their daughter to allow the Respondent to represent her. It is further alleged that Respondent promised to arrange for the marriage of Leesa Hulvey to Darryl Hardy in exchange for Mr. and Mrs. Hulvey's assistance in convincing their daughter to sign a contract of employment with Respondent.

In Count VII it is alleged that on the evening of July 26, 1974, Respondent in the company of Dora Emily Hulvey and Joseph Hulvey, drove to Memorial Hospital in Springfield, Illinois, and upon arrival Respondent again talked to Leesa Hulvey concerning his proposed representation of her and as a result secured two contracts of employment with Leesa Hulvey, one in the name of "Leesa Hulvey" and the other in the name of "Leesa Hardy"; further, it is alleged, that Respondent paid to Leesa Hulvey, after securing the signed contracts of employment the sum of $200.00 in cash.

From the evidence, the panel makes the following findings and conclusions with respect to Counts V, VI and VII:

1. Respondent, with the assistance of Robert Lichtenberger, with whom Respondent had arranged for introductions and names and addresses of persons injured in the Decatur explosion, approached Leesa Hulvey and solicited from her employment to represent her for claims for injuries sustained by her boyfriend and fiancee, Darryl Hardy.

2. Respondent, further, approached Mr. and Mrs. Hulvey, the parents of Leesa Hulvey, and solicited their assistance in convincing Leesa Hulvey to sign contracts of employment with Respondent.

3. Respondent, again, approached Leesa Hulvey and secured from her contracts of employment.

4. The acts and conduct of Respondent in respect to the foregoing constitute improper solicitation of a client, and tend to bring the legal profession into disrepute.

COUNT VIII

There was no evidence offered to support the allegations of Count VIII of the Amended Complaint and it is, therefore, dismissed.

COUNTS IX & X

In Count IX it is alleged that on July 24, 1975 or July 25, 1975, Respondent went to the home of Barbara Hardy in Decatur, Illinois; that Barbara Hardy was the mother of Darryl Hardy, who was hospitalized in the Memorial Hospital at Springfield, Illinois as a result of the Decatur railyard explosion; that Barbara Hardy had neither previously contacted the Respondent, nor had she requested anyone to contact the Respondent on her behalf; that Respondent requested employment by Barbara Hardy in connection with any cause of action she might have as a result of the injuries to her son, Darryl

Hardy; that as a result of such request, Barbara Hardy agreed to permit Respondent to represent her and signed a contract of employment with Respondent; that subsequently thereto, Respondent gave Barbara Hardy the sum of $100.00 in cash.

In Count X, it is alleged that Respondent, on or about July 26 or 27, 1974, went to the home of Brenda K. Hardy in Decatur, Illinois; that Brenda K. Hardy was the divorced wife of Darryl Hardy; that Brenda K. Hardy had neither previously contacted the Respondent nor had she requested anyone to contact the Respondent on her behalf; that Respondent requested Brenda Hardy to permit him to represent her in connection with any cause of action she or her minor child might have as a result of injuries to her ex-husband; that as a result of this request, Brenda K. Hardy agreed to allow Respondent to represent her and her minor child and signed a contract of employment with Respondent; that following execution of the contract of employment Respondent gave to Brenda K. Hardy the sum of $200.00 in cash.

From the evidence, the panel makes the following finds and conclusions with respect to the foregoing Counts:

1. Respondent, without invitation, approached Barbara Hardy, the mother of Darryl Hardy, a seriously injured burn victim of the railyard explosion in Decatur, Illinois and requested employment by Barbara Hardy to represent her in connection with the injuries to her son.

2. Respondent, without invitation, approached Brenda K. Hardy, the divorced wife of Darryl Hardy and requested her to employ Respondent in connection with any cause of action she or her minor child might have as a result of the explosion in the railroad yards at Decatur, Illinois.

3. The actions and conduct of Respondent in respect to the foregoing constitute improper solicitation of clients and tend to bring the legal profession into disrepute.

COUNT XI

In Count XI of the Amended Complaint, it is alleged that Respondent, through the assistance of one John Bollero of Decatur, Illinois, obtained an appointment with one Robert Lichtenberger of Decatur; that Robert Lichtenberger had sustained some injuries and property damage as a result of the railyard explosion in Decatur; that Respondent requested Robert Lichtenberger to employ him in connection with his claim resulting from the explosion; that Respondent was aware at the time that Robert Lichtenberger was represented by another attorney; that Respondent requested Robert Lichtenberger to assist him in meeting other persons injured by the explosion; that Robert Lichtenberger did introduce Respondent to other persons injured in the explosion and their relatives, and arranged appointments for Respondent with certain of these individuals; that Respondent paid to Robert Lichtenberger the sum of $500.00 in cash.

From the evidence, the panel makes the following findings and conclusions with respect to the foregoing:

1. In a telephone call from Chicago to Decatur, Illinois placed by Respondent's girlfriend to her father, John Bollero, Respondent requested the assistance of John Bollero in obtaining introductions to individuals injured as a result of the Decatur, Illinois explosion.

2. As a result of this request, Respondent received a call from Robert Lichtenberger and made an appointment to meet Robert Lichtenberger in Decatur, Illinois.

3. After his arrival in Decatur, Illinois, Respondent solicited employment by Robert Lichtenberger, and requested Robert Lichtenberger to assist Respondent in securing the names of other individuals injured by the explosion and arranging appointments for Respondent to meet with such individuals.

4. Respondent paid Robert Lichtenberger the sum of $500.00 in cash for his assistance in this regard.

5. The actions and conduct of Respondent in regard to the foregoing constitute the improper solicitation of business and tend to bring the legal profession into disrepute.

COUNT XII

In Count XII of the Amended Complaint, it is alleged that Respondent went to the home of Shirley Tucker (now Shirley Shields) subsequent to an appointment having been arranged for Respondent with Shirley Tucker by Robert Lichtenberger; that at the time this appointment was made Shirley Tucker had neither previously contacted Respondent nor had she requested anyone to contact him on her behalf; that Respondent requested Shirley Tucker to employ him in connection with her injuries sustained as a result of the Decatur railyard explosion; that Respondent did obtain a contract of employment with Shirley Tucker; that subsequently Respondent requested from Shirley Tucker the names of any people she might know who were injured in the explosion; that at Respondent's request, Shirley Tucker placed several long distance telephone calls to Peru, Indiana to other individuals who were injured in the explosion and, at Respondent's request, Shirley Tucker asked these individuals whether or not they would like Respondent to represent them in their claims for injuries from the explosion; that Respondent paid to Shirley

Tucker $100.00 in cash to reimburse her for long distance telephone calls made in his behalf.

From the evidence, the panel makes the following findings and conclusions with respect to the foregoing:

1. Through the requested assistance of Robert Lichtenberger, Respondent approached Shirely Tucker and sought employment by her to represent her in connection with her claims for injuries sustained as a result of the railyard explosion in Decatur, Illinois.

2. Respondent requested Shirley Tucker to call other individuals whom she knew and who had been injured in said explosion for the purpose of obtaining employment by said individuals.

3. The actions and conduct of Respondent with respect to the foregoing constitute improper solicitation of clients and tend to bring the legal profession into disrepute.

COUNT XIII

In this Count of the Amended Complaint, it is alleged that Respondent has employed in his law office one William Royal who was suspended from the practice of law in Illinois and subsequently filed a motion to have his name stricken from the roll of attorneys admitted to practice in Illinois. It is further alleged that the employment in a law office of a person who has had his name stricken from the roll of attorneys authorized to practice law gives the appearance of impropriety and intends to bring the legal profession into disrepute.

This Count was submitted to the hearing division on a stipulation by the parties that William Royal's motion to strike his name from the roll of attorneys had been granted by the Supreme Court on March 4, 1964; that Respondent occasionally employed Royal as an investi-

gator; that although Respondent was aware that Royal was not a licensed attorney, Respondent was unaware that such hiring him would tend to bring the legal profession into disrepute.

The Illinois State Bar Association Professional Ethics Opinion No. 362 is part of the records and files in this cause, the same being attached as "Exhibit 1" to suggestions to Respondent's motion pursuant to Sections 45 and 48 of the Civil Practice Act, filed on September 5, 1975 in this proceeding.

From the evidence, the panel makes the following findings and conclusions with respect to Count XIII of the Amended Complaint:

1. The status of William Royal, the investigator employed by Respondent, is that of a lawyer whose name has been stricken from the roll of attorneys licensed to practice in the State of Illinois, upon his own motion. He is not a "disbarred" lawyer in the technical sense.

2. Illinois State Bar Association Professional Ethics Opinion No. 362 deals with "disbarred" lawyers and it is concluded therein that the employment of "disbarred" lawyers presents the appearance of impropriety in violation of Canon 9 of the Code of Professional Conduct as adopted in Illinois.

3. The allegations of Count XIII of the amended Complaint have not been proven by clear and convincing evidence and this Count is, therefore, dismissed.

COUNT XIV

In Count XIV of the Amended Complaint it is alleged that in January, 1969, Respondent went to Laurel, Mississippi where a railroad derailment and explosion had occurred in a residential district resulting in injuries to numerous persons and extensive property damage. It is

further alleged that Respondent solicited employment from various persons injured in the explosion; that at the time he arrived in Laurel, Mississippi, Respondent had not been retained by any injured parties nor had any injured parties requested that Respondent contact them concerning their injuries. It is further alleged that while in Laurel, Mississippi, Respondent attempted the unauthorized removal from Charity Hospital of a mother and her children who were not clients of Respondent and who had not sought his services. These efforts resulted in Respondent's arrest on the complaint of the hospital administrator for disorderly conduct; that Respondent posted the required bond and thereafter forfeited bond.

The evidence indicates that Respondent went to Laurel, Mississippi at the invitation of Rev. Allan Johnson, Sr., pastor of United Methodist Church in Laurel, Mississippi. The evidence further shows that Rev. Johnson called Respondent on the telephone at the behest of Luther Garroway of Chicago, Illinois, identified as a cousin of Rev. Johnson. The evidence further shows that Luther Garroway had employed Respondent in 1962 to represent him in connection with the purchase of a house in Chicago and had retained Respondent's business card.

The evidence further shows that after his arrival in Laurel, Mississippi, Respondent attended a meeting at Rev. Johnson's church, during which he was introduced to the congregation by Rev. Johnson as a good lawyer from Chicago who could assist those having claims against the railroad as a result of the derailment and explosion. Other lawyers were also present at this meeting. The evidence shows that Rev. Johnson arranged for several members of his church to accompany Respondent around Laurel, Mississippi to visit those injured in the disaster and their family and friends.

Individuals who were vistited by Respondent in company with local church members were present and testified, including Dorothy Bunch Brown and Sears Ward. Evidence was also introduced showing the circumstances surrounding the arrest of Respondent by the hospital administrator in Laurel resulting from Respondent's efforts to remove the Carpenter family to another hospital. The evidence shows that these efforts by Respondent were the result of Rev. Johnson's concern over conditions at the hospital and his request to Respondent.

From the evidence, the panel makes the following findings and conclusions with respect to the foregoing:

1. Respondent, without invitation or request by Sears Ward, called upon Sears Ward in Laurel, Mississippi at his place of business, identified himself as a lawyer and requested Mr. Ward's permission to talk with Ward's parents concerning the injuries they had sustained as a result of the railroad disaster and offered to advance money to Mr. Ward's parents if they needed it. Respondent on a later occasion came to the store where Ward worked and inquired of Ward if he had thought further about the proposition Respondent had made to him concerning his representation of his parents.

2. Respondent came to the home of Dorothy Bunch Brown in Laurel, Mississippi, and asked her to sign a contract of employment. Mrs. Brown did sign a contract of employment, on a later occasion, employing Respondent at which time Respondent gave her $100.00 in cash and offered to give to Mrs. Brown $80.00 per week thereafter. She had previously received the sum of $100.00 from a man by the name of Cornelius. Payments by Respondent to Mrs. Brown totalled $500.00.

3. The actions and conduct of Respondent in Laurel, Mississippi with respect to the foregoing constitute the improper solicitation of a client and tend to bring the legal profession into disrepute.

4. The incidents involving Respondent's arrest as a result of his attempts to remove the Carpenter family from the Charity Hospital in Laurel, Mississippi do not, in the opinion of the panel, warrant disciplinary action or consideration of disciplinary action, and we, therefore, make no findings in respect to those events.

RECOMMENDATION

The record in this case presents a series of events which, in the opinion of the Hearing Panel, reflects in the most adverse way upon the legal profession. The record is replete with attempts by the Respondent to justify his actions by arguing that he was "invited" by this person or that person and that he was "introduced" to the individuals having claims for personal injuries as a result of tragic disasters. The fact of the matter, however, as we have found in our findings and conclusions, is that in each instance Respondent either arranged for someone to secure an invitation or arranged for an introduction on his own volition.

While the actions of Respondent in connection with the Laurel, Mississippi disaster in 1969 are somewhat remote in time and, for that reason may or may not warrant disciplinary action standing alone, the Panel feels that Respondent's conduct on that occasion should be considered in establishing a pattern over a period of years of the manner in which Respondent conducted himself in securing clients.

Although the Panel did not feel that it was essential to this report and its recommendation, there is evidence in the record, particularly in respect to the Laurel, Mississippi cases, that Respondent did very little actual legal work in the handling of the claims and litigation, but instead "farmed" them out to a New Orleans law firm which concluded them.

The conduct of Respondent was and is detrimental to the legal profession, the ethical standards which are imposed upon the profession, and the public in general.

It is our recommendation that Respondent be suspended from the practice of law for a period of five (5) years and until the further order of the court.

_____
Guilbert H. Brown, Chairman

/s/ _____
Roy I. Peregrine, Commissioner

/s/ _____
John M. Ferguson, Commissioner

APPENDIX D

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK

Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

March 30, 1979

Mr. Marshall I. Teichner
Attorney at Law
180 North LaSalle – Rm. 1825
Chicago, IL 60601

No. 49982 – *In re:* Marshall I. Teichner, an Attorney. Disciplinary Commission.

The Supreme Court today denied the petition for rehearing in the above entitled cause. Mr. Justice Kluczynski took no part.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

June 19, 1979

Nathan Lewin, Esquire
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Re: *Marshall I. Teichner, A-1092*

Dear Mr. Lewin:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Stevens who, on June 18, 1979, signed an order extending your time to and including August 24, 1979.

A copy of the Justice's order is enclosed.

Very truly yours,

Michael Rodak, Jr., Clerk

By:

/s/ Francis J. Lorson
Deputy Clerk

th
Enc.

cc: Philip Schickedanz, Esquire
Illinois Attorney Disciplinary System
One North Old Capital Plaza, Suite 330
Springfield, Illinois 62701

SUPREME COURT OF THE UNITED STATES

No. A-1092

In re
Marshall I. Teichner,
Petitioner,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 24, 1979.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 18th day
of July, 1979.